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INTRODUCTION TO THE SYMPOSIUM ON CONFLICTS OF RIGHTS

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The literature on rights in both moral and legal philosophy is voluminous, so voluminous that there may seem to be little justification for one more symposium to swell its ranks. But the discussion of rights has been fairly tightly organized around several narrow topics of debate, among them whether rights should be explained in terms of interests or choices,¹ whether rights are strictly correlative with duties,² and the relation between rights and utility.³ The inspiration for the present symposium is the sense that one topic of central importance has generally been given short shrift: the question of whether rights can conflict. There is, of course, a perfectly good explanation for why this topic has received so little attention; namely that contemporary rights theorists have generally *assumed* that rights cannot conflict.⁴ But this assumption seems to be out of keeping with the way people commonly speak about rights as well as the way in which rights are usually understood in our constitutional tradition.

The papers in this volume were presented at a conference on conflicts of rights, hosted by the University of Pennsylvania Institute for Law and Philosophy in October 1999. Given the general sympathy of most members of the symposium to the possibility of conflicts, it came as something of a surprise to discover that while most of the papers in the symposium agree that rights can conflict and agree that this has important implications for the theory of rights, no two of the papers traces those implications in remotely the same way. The wide divergence among papers with a common orientation made clear to all of us that the issues addressed in this volume are only a starting point for a much broader discussion about the role of

1. The traditional debate is between the “Interest Theory” and the “Will Theory.” For a discussion of this, see *A DEBATE OVER RIGHTS* (Kramer et al. eds., Clarendon Press 1998).

2. See L.W. SUMNER, *THE MORAL FOUNDATION OF RIGHTS* §2.2 (Clarendon Press 1987) for a discussion of this point.

3. See, e.g., RONALD DWORKIN, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153–68 (Jeremy Waldron ed., Oxford University Press 1984).

4. Notable exceptions include JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* (Harvard University Press 1990) (who allows that rights can conflict without specifically discussing the point); JEREMY WALDRON, *Rights in Conflict*, in *LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991* (Cambridge University Press 1993).

rights in moral theory. These papers also attest to the fact that the more traditional debates in the theory of rights far from exhaust the interesting questions to be explored in the theory of rights. Examining the problem of rights in conflict proved a helpful way to expose many of the novel issues that the usual discussions in the theory of rights seem to overlook.

Frances Kamm argues that the rights people have are primarily important because they express the person's status as a being who has a high level of inviolability. Once we see rights this way, we can make sense of why it could be impermissible to violate a person's right for the sake of preventing more violations of the same kind. Thus we may think it impermissible to interfere with Nazi speech for the sake of preserving more instances of free speech itself, which the Nazi speech would foreclose. A strong conception of the right to free speech, Kamm thinks, would "exclude as a reason to limit it protection of free speech itself."⁵ And she goes on to explain that "the right expresses the idea of a status that each has to speak freely, even if respecting this status results in some people who still have such a status being prevented from actually speaking freely because they improperly have their right violated."⁶ Rights can conflict, she allows, because a right can be permissibly infringed as long as the infringement does not fundamentally violate this inviolable status.

More than one of the papers is concerned with whether conflicts of rights render morality inconsistent. Phillip Montague argues that if rights can conflict, it can be permissible for a right-holder to do something at the same time that another person's conflicting right places him under a duty to refrain from doing it.⁷ The problem, Montague thinks, comes from combining the assumption that rights can conflict with two further assumptions: first, that if A has a right to ϕ , it is permissible for A to ϕ , and second, that if A has a right to ϕ , then others have a duty not to interfere with A's ϕ -ing. Montague's solution is to regard statements about rights as merely "prima facie": rights can conflict at the prima facie level, but these conflicts will be resolved at the all-things-considered level at which we make final attributions of entitlements and obligations. His solution, in short, is to deny that we can infer that it is permissible for A to ϕ from an initial statement that he has a right to ϕ .

My own paper also focuses on the problem of inconsistency due to conflicting rights. I too argue that the inconsistency is a product of combining the assumption that rights can conflict with two further assumptions: the correlativity of rights and duties, and the assumption that if A has a right to ϕ , then she cannot also have a duty to refrain from ϕ -ing. (The former corresponds to Montague's first assumption, but the latter diverges from his second assumption.) After arguing that rights can conflict, I conclude that it is the second of these two assumptions that we ought ultimately to reject. I reach this conclusion by drawing some lessons from the literature on

5. Kamm, this issue, at 246.

6. *Id.*

7. Montague, this issue, at 261.

conflicting duties, or “moral dilemmas.” In particular, I argue that the solution proposed separately a number of years ago by Bernard Williams and Bas Van Fraassen of rejecting the agglomeration of conflicting duties applies to rights. Rejecting the second of the two assumptions above turns out to be the equivalent for the theory of rights of rejecting agglomerativity in the theory of duties.

Heidi Hurd addresses the problem of conflicts of rights through the lens of tort law. She is interested in particular in whether tort law ought to require potential tortfeasors to anticipate another person’s wrongful behavior, against the background of a corrective justice approach to tort law. Tort law imposes duties to anticipate another’s wrongdoing that, Hurd argues, a deontologist should reject. For example, the law typically requires home owners to take precautions against unsafe conditions on their land on behalf of trespassers, drivers to anticipate other people’s wrongful driving, and people to guard against criminal activity by locking their doors and windows and removing their keys from their cars. The reason these requirements are unjustified, Hurd thinks, is that a person who engages in no wrongdoing himself ought not to have his activities limited by the wrongdoing of others. While the claim Hurd rejects, she says, does not involve a conflict of rights strictly speaking, it does involve the suggestion that “wrongdoers, by their wrongdoing, acquire rights that others should abandon actions that they (otherwise) have rights to do.”⁸ It is, she claims, the assertion that “the perpetration of a wrong trumps the exercise of a right,” a claim she thinks a deontologist should find “perversely paradoxical.”⁹ While Hurd does not articulate her thesis in terms of conflicts of rights, she suggests that the intuition that rights cannot conflict may be part of what drives her argument.

Finally, Leo Katz argues that there are situations in which it is possible for various parties to a conflict all to be justified, and all to be in the right, even though they oppose one another. Indeed, he thinks the world has witnessed an unresolvable conflict of precisely this sort: World War I. In arguing against what he calls the “Correspondence Thesis,” Katz attacks precisely the thesis for which Hurd had argued in her book, *Moral Combat*. The Correspondence Thesis maintains that if X has a right to ϕ , then Y does not have a right to hinder X’s ϕ -ing. The intuition behind the Correspondence Thesis is that “morality cannot be gladiatorial.”¹⁰ It is, in other words, the worry about inconsistency in another guise. Katz argues that the Correspondence Thesis is inconsistent with a deontological conception of rights. The reason, he explains, is that deontological morality is “path-dependent,” meaning that the same end can be both permissible and impermissible, depending on the path by which it is attained. The result is that each party to a conflict can be in the right in launching an attack against

8. Hurd, this issue, at 308.

9. *Id.*

10. Katz, this issue.

the other, as long as he proceeds along one of the permissible paths to his end.

Collectively, these papers constitute a detailed exploration of the question whether rights can conflict and the implications for moral and legal theory of allowing that they can. Although Hurd is the only author of the five implicitly to reject the possibility of conflicts of rights, she offers an unusual defense of that rejection, one that proponents of conflicts ought not to dismiss. Whether, as Katz would say, all parties to *this* conflict can be in the right while disagreeing, my hope is that the papers in this volume will provide the impetus for a wider discussion on the topic of conflicts of rights.

Philadelphia, April 2001